International Brotherhood of Teamsters Local 25 *and* Denise Avallon. Case 01–CB–010882

June 1, 2018

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On February 20, 2014, Administrative Law Judge Michael A. Rosas issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.[2]

I. BACKGROUND

In the underlying unfair labor practice proceeding,[3] the Board found that the Respondent, a union that operates an exclusive hiring hall, violated Section 8(b)(1)(A) and (2) by refusing to refer Charging Party Denise Avallon from its casual referral list for work with employers contracting with the Respondent for drivers. The Board ordered the Respondent to, among other things, "[m]ake Denise Avallon whole for any loss of earnings and other benefits suffered as a result of its unlawful failure and refusal to refer her for employment." Id. at 54. On June 27, 2013, the Regional Director for Region 1 issued an amended compliance specification setting forth the amount of backpay assertedly owed to Avallon. The backpay period ran from March 8, 2008, to August 24, 2011.

After a backpay hearing, the judge found that Avallon was entitled to backpay for 2008, based on her demonstrated efforts during that time to obtain interim employment, and 2011, based on the Respondent's failure to establish the existence of substantially equivalent employment opportunities in 2011. The judge found, however, that Avallon was not entitled to backpay for 2009 or 2010 because he found that the Respondent established the existence of substantially equivalent employment and that Avallon had not engaged in a reasonable search for work in those years.

The General Counsel excepts to the judge's determination that the Respondent established the existence of substantially equivalent employment during any portion of the backpay period and argues that Avallon is entitled to the full amount of backpay set forth in the compliance specification. The Respondent cross-excepts to the judge's determination that Avallon is entitled to backpay for 2008 and 2011, arguing that Avallon is not entitled to any backpay.

As discussed below, we find merit in the General Counsel's contention that the Respondent failed to establish the existence of substantially equivalent employment during 2008–2010. Further, we adopt the judge's finding that the Respondent failed to establish the existence of substantially equivalent employment during 2011. Having found that the Respondent failed to meet its burden of establishing the existence of substantially equivalent employment during any portion of the backpay period, we find that the discriminatee, Denise Avallon, is entitled to backpay as set forth in the amended compliance specification.

II. DISCUSSION

An unfair labor practice finding by the Board that an employee was unlawfully terminated "is presumptive proof that some backpay is owed." *St. George Warehouse*, 351 NLRB 961, 963 (2007) (citing *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987), enfd. in relevant part 876 F.2d 678 (8th Cir. 1989)). The General Counsel bears the burden of establishing the gross backpay due to a discriminatee. Once the General Counsel has met this burden, the Respondent may establish an affirmative defense that would reduce its liability, including, for example, willful loss of earnings. See *Millennium Maintenance & Electrical Contracting*, 344 NLRB 516, 517 (2005); *Chem Fab Corp.*, 275 NLRB 21, 21 (1985), enfd. mem. 774 F.2d 1169 (8th Cir. 1985). The Board may toll backpay during any portion of the backpay period in which a discriminatee failed to mitigate her losses.

In this case, the General Counsel introduced the amended compliance specification detailing the gross backpay owed Avallon. The Respondent stipulated to the accuracy of the gross backpay calculation, and that amount is not in dispute. Having found that the General

[1] Chairman Ring is recused and took no part in the consideration of this case.

[2] In ordering that the Respondent make whole the New England Teamsters & Trucking Industry Pension Fund, the judge inadvertently omitted interest on those contributions. Thus the Respondent must make whole the pension fund by contributing the $11,010.86 in pension fund contributions, as detailed in the compliance specification, but also any additional amounts due the fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[3] 358 NLRB 54 (2012).

Counsel met his initial burden of establishing gross backpay, we turn to the Respondent's affirmative defense.

The Respondent argues its backpay liability should be reduced because Avallon failed to mitigate her losses. In addressing such an argument, the Board is guided by well-established principles. A respondent's contention that a discriminatee has failed to make a reasonable search for work generally has two elements—one, that there were substantially equivalent jobs within the relevant geographic area and, two, that the discriminatee unreasonably failed to apply for these jobs. *St. George Warehouse*, above at 961.[4] Although a backpay claimant has a duty to mitigate her loss of income, she is held only to a good-faith effort, not the highest standard for diligence. *Lundy Packing Co.*, 286 NLRB 141, 142 (1987), enfd. 856 F.2d 627 (4th Cir. 1988). For a respondent to prove its affirmative defense, it must show, on the part of the backpay claimant, a "clearly unjustifiable refusal to take desirable new employment." Id. (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941)). Any doubts or uncertainties are resolved in favor of the discriminatee, not the respondent. *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973); see also *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006), enfd. 508 F.3d 418 (7th Cir. 2007).

In support of its argument that Avallon's backpay should be reduced, the Respondent commissioned Rhonda Jellenik, a certified rehabilitation counselor, to produce a report determining whether there were substantially equivalent jobs in the relevant labor market during the backpay period. Jellenik's report consists of three main data sets: (1) job vacancy data during various quarters of the backpay period; (2) wage data for individuals actually employed during the backpay period; and (3) tables of individual job vacancies.[5] Contrary to the judge, we find the information presented in the report and about which Jellenik testified is not sufficient to meet the Respondent's burden. Even assuming, *arguendo*, that this evidence establishes the existence of *some* jobs, it does not establish the existence of *substantially equivalent* jobs within the relevant geographic area.[6]

In evaluating whether a position is "substantially equivalent," the Board compares various criteria, such as pay,[7] working conditions, job duties,[8] commutes, and

[4] Although traditionally the respondent has borne the burden of producing evidence as to both elements of its affirmative defense, the Board in *St. George Warehouse* modified the burden of production with respect to the second element. Thus, if the respondent shows that there were substantially equivalent jobs in the relevant geographic area, the General Counsel bears the burden of producing evidence concerning the reasonableness of the discriminatee's job search. The General Counsel can meet this burden, however, solely through the discriminatee's testimony, and the respondent bears the ultimate burden of persuasion on its contention that a discriminatee failed to make a reasonable search for work. *St. George Warehouse*, above at 963–965.

Members Pearce and McFerran note that no party has asked the Board to overrule the burden-shifting framework established in *St. George Warehouse*.

[5] In addition to collecting information regarding driving jobs during the backpay period, Jellenik performed a "transferrable skills analysis" to identify non-driving jobs for which Avallon was qualified. The Respondent's burden, however, is not to establish the existence of *any* jobs, but rather to establish the existence of *substantially equivalent* jobs. *St. George Warehouse*, above at 964 ("When a respondent raises a job search defense to its backpay liability and produces evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period, we will place on the General Counsel the burden of producing evidence concerning the discriminatee's job search."). The portions of Jellenik's testimony and report pertaining to jobs in food preparation and service, sales, and office and administrative support are not probative of that issue. Additionally, discriminatees are not required to accept interim employment with lower wages and less desirable working conditions. *Pennsylvania State Corrections Officers Assn.*, 364 NLRB No. 108, slip op. at 5 (2016) (citing *Lundy Packing Co.*, above at 144). Moreover, the Board has tolled backpay for discriminatees who did not look for work in their field and instead sought lower-paying jobs in a different profession. See, e.g., *Aero Ambulance Service*, 349 NLRB 1314, 1316 (2007) (discriminatee's failure "to pursue EMT work or work in related fields 'was in essence a willful loss of earnings standing between [him] and [his] right to backpay'" (quoting *NHE/Freeway*, 218 NLRB 259, 260 (1975), enfd. 545 F.2d 592 (7th Cir. 1976))).

[6] The General Counsel excepted to the judge's consideration of the greater Boston area as part of the relevant geographic area. Because we find that the Respondent's evidence is not sufficient to establish the existence of any substantially equivalent jobs, it is unnecessary to pass on whether the judge erred in including the greater Boston area in his analysis.

[7] Board law "does not require that the wages of interim employment be identical, but rather substantially equivalent." *First Transit, Inc.*, 350 NLRB 825, 826 (2007). Thus, the Board has found that a job driving a car for $8 per hour was substantially equivalent to the discriminatee's prior job driving a truck for $8.75 per hour. Id. at 826. Two grocery store jobs were not substantially equivalent, however, where one position paid $5.50 an hour which, on a weekly basis, "amounts to just 68 percent of what de la Cruz earned per week at Met Food, and demonstrates—along with the $1 per hour disparity in his hourly wages at Met Food compared to Key Food—that his job at Key Food was not substantially equivalent to his job at Met Food." *Met Food*, 337 NLRB 109, 109 (2001); see also *Arlington Hotel Co.*, 287 NLRB at 854 (finding that a $3.35 per hour entry-level, minimum wage job as a cook was not substantially equivalent to a $4.50 per hour job as a more experienced cook); *Lundy Packing Co.*, above at 145 (Edward Stevens, above); id. (Aliene Raynor) (finding a position that provided pay that was "substantially below the rate [discriminatee] would have received if she had not been unlawfully discharged" was not substantially equivalent employment); id. at 146 (Jesse Barksdale, above).

[8] The Board has found that a position as corrections officer, which involved care, custody, and control of prison inmates, was not substantially equivalent to a position as union business agent, an office job involving enforcement of a collective-bargaining agreement. *Pennsylvania State Corrections Officers Assn.*, above, slip op. at 5. Likewise, the Board has found that work as a bartender and a film extra is not substantially equivalent to work as an EMT. *Aero Ambulance Service*, above at 1315–1316; see also *Lord Jim's*, 277 NLRB 1514, 1516 (1986) (finding that busboy/bathroom cleaner job was not substantially

work locations. *Pennsylvania State Corrections Officers Assn.*, above, slip op. at 5. The Board has also considered hours, shift scheduling, and benefits. See, e.g., *Lundy Packing Co.*, above at 145 (Edward Stevens) (finding that a position that provided "low wages, heavy work, long hours, and [the] absence of benefits" was not substantially equivalent to the position from which discriminatee was discharged); id. at 146 (Jesse Barksdale) (citing lower wages, night shift, and lengthy commute in finding interim employment not substantially equivalent).

Jellenik's report includes a job vacancy table that pulls data from Massachusetts work force development job vacancy surveys and provides the total number of job openings throughout the state, the number of openings in transportation and warehousing, and the type of opening (private, part-time, seasonal/temporary) for the second and fourth quarters of 2008 and 2009 and the second quarter of 2010. The report does not, however, include any additional information about the jobs, such as what duties they entail or how much they pay. Even assuming that this data proves the existence of some available jobs during the relevant backpay period, it does not establish the existence of any substantially equivalent jobs. Although it is possible that some of the openings were substantially equivalent to employment Avallon would have received through the Local 25 hiring hall, without data as to pay, hours, or job duties it is impossible to establish which or how many were. See *Pennsylvania State Corrections Officers Assn.*, above, slip op. at 5.

Jellenik's report also includes wage data for three occupational titles: (1) truck drivers, light or delivery services; (2) taxi drivers and chauffeurs; and (3) bus driver, school or special client. For each of these three job categories, Jellenik provided for each year of the backpay period the total number of individuals presently employed in these categories and a breakdown of the lowest to highest wages statewide, as well as in discrete areas of the state. The Respondent's reliance on this data misses the mark, however, because the data covers only individuals already employed and does not establish the existence of open, available jobs within the relevant geographic area. Thus, the data appears to show that a percentage of employed drivers were receiving wages substantially equivalent to what Avallon would have been paid for work secured through the Local 25 hiring hall, but it does not show that there were any *available* jobs offering similar wages and, if so, how many. Further, even if we were to assume that wage data of presently employed individuals is relevant to determining the existence of substantially equivalent employment, we find that the data presented here would still be insufficient to meet the Respondent's burden. Although the wage data presented indicates that some portion of existing driving jobs provided wages comparable to the driving work Avallon would have secured through the Local 25 hiring hall, Jellenik testified that she did not know whether Avallon would be qualified for those jobs if they had been available. As the Board stated in *St. George Warehouse*, it is the Respondent's burden to "produce evidence and prove that there were suitable jobs available for someone with the discriminatee's qualifications." 351 NLRB at 963. The data relied on by Jellenik clearly does not meet this standard.

Lastly, Jellenik included in her report a list of employers who were hiring for non-CDL drivers during the backpay period. She provided the name of the company, the timeframe, the position, and the salary. These positions, however, only paid approximately 44–74 percent of what Avallon had earned from driving work secured through Local 25. See, e.g., *Lundy Packing Co.*, 286 NLRB at 145 (Aliene Raynor) (finding a "substantially [lower]" pay rate not substantially equivalent employment). Additionally, the report does not provide hours, addresses, or duties for these jobs so as to be useful in determining whether they constituted substantially equivalent employment.

In light of the foregoing, we find that Jellenik's report does not satisfy the Respondent's burden of proving the existence of substantially equivalent jobs under *St. George Warehouse*. In so finding, we acknowledge the Respondent's contrary arguments based on *St. George Warehouse*. Specifically, the Respondent argues that a respondent can satisfy the requirement to show substantially equivalent jobs in the relevant geographic area by calling a vocational expert as a witness to testify that there are a number of comparable jobs in the geographic area based upon Bureau of Labor Statistics data or classified ads. The Respondent argues that Jellenik's report and testimony is comparable to the evidence of substantially equivalent jobs the Board found sufficient in *St. George Warehouse*.

The Respondent is correct that the respondent in *St. George Warehouse* met its burden of establishing the existence of substantially equivalent jobs in the relevant geographic area through the introduction of expert testimony. We disagree, however, that the same conclusion is warranted here. The fact that specific expert testimony was found sufficient in *St. George Warehouse* to meet the respondent's burden of proving the existence of substantially equivalent employment does not mean that *any*

equivalent to cocktail waitress job) (cited by *Pennsylvania State Corrections Officers Assn.*, above, slip op. at 5).

expert testimony is sufficient to meet a respondent's burden. Further, as explained, Jellenik's report provides job opening data without wage or other relevant information, wage data without job opening information, and job openings with wages that are clearly not substantially equivalent to the work and wages Avallon enjoyed when referred to driving work by the Respondent. Such evidence is insufficient to meet the Respondent's burden under *St. George Warehouse*.

Having found that Jellenik's report does not establish the Respondent's burden of proving the existence of substantially equivalent employment, we find that Avallon is entitled to backpay for the entire backpay period, as set forth in the compliance specification.[9]

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Teamsters Local 25, based in Charlestown, Massachusetts, its officers, agents, and representatives, shall make whole Denise Avallon by paying her $47,320.91, plus interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), and minus tax withholdings required by Federal and State laws. In addition, we shall order the Respondent to pay Avallon an additional sum for the adverse tax consequences of the multiyear lump sum backpay award, as prescribed in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).[10] In addition, Local 25 shall make whole the New England Teamsters & Trucking Industry Pension Fund by contributing $11,010.86 on Avallon's behalf, as well as any additional amounts due the fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Dated, Washington, D.C. June 1, 2018

Mark Gaston Pearce,	Member
Lauren McFerran,	Member
Marvin E. Kaplan,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Douglas Callahan and *Scott F. Burson, Esqs.,* for the General Counsel.

Michael A. Feinberg and *Renee J. Bushey, Esqs.,* for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This supplemental proceeding was tried before me in Boston, Massachusetts, on December 5–6, 2013. It followed issuance of a Decision and Order, dated March 1, 2012 (358 NLRB 54) (the Decision and Order), in which the National Labor Relations Board (the Board) affirmed Administrative Law Judge Mark Rubin's decision finding that the International Brotherhood of Teamsters, Local 25 (Local 25) operated an illegal hiring hall by unlawfully failing and refusing to refer Denise Avallon for employment from March 8, 2008, through August 24, 2011, in violation of Section 8(b)(1)(A) and (2).[1] The Board further ordered Local 25 to, among other things, make Avallon whole for any loss of earnings and other benefits suffered as a result of its illegal conduct and consider her for future employment referrals.[2]

Subsequent to the issuance of the Decision and Order, the parties stipulated on April 23, 2013, that Local 25 would not contest the propriety of the Decision and Order, but preserved Local 25's right to a hearing if the parties were unable to reach agreement on the issue of backpay.[3]

[9] In light of our finding that the Respondent failed to meet its burden of proving substantially equivalent employment, it is not necessary for us to reach the question of whether the discriminatee's job search was reasonable. We therefore find it unnecessary to pass on the judge's findings and the parties' exceptions regarding the reasonableness of the discriminatee's job search.

Even assuming the testimony and report of the expert witness were sufficient to meet the Respondent's initial burden of establishing the availability of substantially equivalent employment, Member McFerran would find that the Respondent has not met its overall burden of establishing a "clearly unjustifiable refusal to take desirable new employment" *Lundy Packing Co.*, 286 NLRB 141, 142 (1986), enfd. 856 F.2d 627 (4th Cir. 1988), quoting *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 199–200 (1941), and therefore Avallon is entitled to backpay for the entire backpay period.

[10] The Regional Director for Region 1 issued an amended compliance specification on June 27, 2013, setting forth $1060.21 as the additional sum due Avallon for the adverse tax consequences of the multiyear lump sum backpay award. As this Supplemental Decision & Order issues in a different year than the amended compliance specification, we recognize that the amount due Avallon may be higher or lower than the amount listed in the amended compliance specification as her tax situation may be different in 2018. We therefore leave to the Region to update this number as appropriate.

[1] GC Exh. 1(a).

[2] On April 23, 2013, the Union and the General Counsel entered into a stipulation conceding, in part, the propriety of the Board's March 1, 2012 Order, including the findings of fact and conclusions of law underlying said Order, and providing for the issuance of a compliance specification and notice of hearing to resolve any disputes concerning the amount of the make whole remedy due Avallon. (GC Exh. 1(c).)

[3] GC Exh. 1(c).

After failing to agree with the General Counsel as to the sum of money necessary to make Avallon whole, Region 1 issued an amended compliance specification and notice of hearing on June 27, 2013, seeking $47,320.91 in net backpay,[4] $11,010.86 for pension fund contributions and $1,060.21 for excess tax liability, for a total of $59,346.45.[5] Local 25 stipulated as to the accuracy of the backpay calculated in the amended compliance specification, but reserved the right to contest whether the Region: (1) reasonably determined the applicable backpay period; (2) correctly included pension fund contributions, and (3) properly imposed a *Latino Express* remedy. Local 25 also preserved an affirmative defense that Avallon willfully incurred a loss of income by failing to conduct a reasonable job search when substantially equivalent employment was readily available.[6]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Union, I make the following

FINDINGS OF FACT

The Compliance Specification

A. The Backpay Period

The backpay period, as set forth in the compliance specification, begins on March 8, 2008, the date Avallon was placed on the referral list under the terms of Teamsters Local 25 Motion Pictures and Television Production Industry Referral Rules, dated December 16, 2007 (2007 Referral Rules). About 3 years later, those rules were replaced by Teamsters Local 25 Motion Pictures and Television Production Industry Referral Rules, dated February 24, 2011 (2011 Referral Rules). The 2011 Referral Rules required drivers to have commercial driver's licenses (CDL), but provided a 6-month grace period for "Casual List" drivers to obtain such certification.

Given Avallon's conceded failure and/or inability to obtain a CDL license, the Region ended the backpay period at the conclusion of the grace period, August 24, 2011.[7] The undisputed net backpay breaks down as follows:

Year	Quarter 1	Quarter 2	Quarter 3	Quarter 4
2008	$1,656.72	$10,062.39	$5,510.95	$6,307.47
2009	0	1,401.66	13,309.03	$7,072.99
2010	350.42	$350.42	350.42	0
2011	$350.42	$350.42	$247.60	0

[4] Backpay consists of hourly wages, vacation rates and meal allowances. (GC Exh. 1(a), Exh. 1.)

[5] In his brief, the General Counsel withdraws the claim for $13,935.10 in missed contributions to Local 25's health plan. (GC Exh. 1(d), (f), and (i).) In that respect, the testimony of Carol Blanchard, executive director of Local 25's health services and insurance plan, is disregarded. (Tr. 86–96.).

[6] GC Exh. 1(f) at 4; Tr. 7–9.

[7] The 2011 Referral Rules were unambiguous as to their effective date—February 24—and the additional 6-month grace period beyond that date for members to obtain CDL licenses. (GC Exh. 2 at 6, 8; Tr. 27–28.) It is unclear, therefore, as to Local 25's basis for sending out warning letters on July 27, 2011, essentially reducing the grace period by about 3 weeks. (GC Exh. 39.)

B. Pension Fund Contributions

The amended compliance specification also included a sum for missed payments required by the collective-bargaining agreement (CBA) during the backpay period to the New England Teamsters & Trucking Industry Pension Fund (pension fund).[8] The fund currently has $2.7 billion in assets and 72,000 plan participants.[9]

Avallon is vested in the pension fund and is eligible to receive monthly pension payments in 2023. Pension fund contributions are payable to vested members when they work at least 375 hours per calendar year. The financial health of the fund is predicated on employers contributing to it pursuant to collective-bargaining agreements. Thus, the pension fund would be harmed to the extent that it is ordered to provide Avallon with additional pension credit without receiving the appropriate amount of contributions.[10]

Based on the projected gross backpay, Local 25 would have contributed $11,010.86 to the pension fund on her behalf.[11] In arriving at that amount, the Region relied on the average hours worked by similarly situated "Casual List" employees referred by Local 25, multiplying the hours by the applicable contribution rates, and calculating the following sums for each quarter of the backpay period:[12]

Year	Quarter 1	Quarter 2	Quarter 3	Quarter 4
2008	$558.88	$2,199.16	$1,157.19	$1,382.94
2009	0	$307.32	3,115.56	1,721.34
2010	$85.28	$85.28	142.96	0
2011	93.73	$93.73	67.49	0

With respect to any omitted contributions to the pension fund, Local 25's CBA with one employer, the New England Motion Picture and Television Production Producers Association, running from October 2008 to September 2013, specifies the enforcement remedy available to Local 25; it is, however, silent as to whether the same remedy would be available to aggrieved members against Local 25. Article 9(d) of that CBA stated, in pertinent part:

> If the production company shall fail to make contributions to the Pension Fund by the twentieth (20) day of the month following the month during which the Employees performed work or received pay or were due pay within the scope of this collective bargaining agreement . . . the Union shall have the

[8] GC Exh. 5 at 2; GC Exh. 6 at 3.

[9] This finding is based on the credible and unrefuted testimony of Charles Langone, the pension fund's administrator. (Tr. 97.)

[10] Local 25 concedes that it would be liable to reimburse the pension fund with contributions for additional pension credit awarded to Avallon as the result of a backpay award. (Tr. 101–103; R. Exh. 1.)

[11] Langone testified that Avallon would have accrued pension benefits for 2008 and 2009 totaling $184 based on the work hours listed in the compliance specification, but nothing in 2010 since she would not have met the annual "threshold" of at least 375 hours worked. (Tr. 99–100.) The actual pension benefit, however, is irrelevant, as the compensable amount is Local 25's contributions to the pension fund on Avallon's behalf pursuant to the collective-bargaining agreement. See, e.g., item 14 at p. 2 of the August 24, 2009 "Wichita" letter. (GC Exh. 6.)

[12] GC Exh. 1(d), Exh. 1.

> right to . . . take whatever steps it deems necessary to secure compliance with this Agreement . . . and the production company shall be responsible to the Employees for losses resulting there from. Also, the production company shall be liable to the Trustees for all costs of collecting the payments due together with attorneys' fees and such interest, liquidated damages or penalties which the Trustees may assess or establish in their discretion."[13]

C. Income Tax Reimbursement

Relying on the Board's recent decision in *Latino Express, Inc.,* 359 NLRB 518 (2012), the amended compliance specification also included the sum of $1,060.21 to reimburse Avallon for the additional income tax burden she will incur after receiving a lump sum backpay award. The compensable amount consists of the excessive tax burden of $844.98 resulting from the backpay award and, since that too would be treated as income, an additional $215.22 to cover the resulting tax consequences of the reimbursement.[14]

Avallon's Inability to Obtain Interim Employment

A. Avallon's Experience and Qualifications Prior to the Backpay Period

Avallon is 54 years old and resides with her husband, a welder, in North Attleboro, Massachusetts. She has a high school diploma, approximately 2 years of college credits accumulated over the course of 10 years, and has worked in a wide assortment of positions. Avallon's experience over the past 20 years includes customer service, clerical work, driving a delivery truck for UPS and a mail truck for Brown University, driving motion picture personnel in a 15-person van to and from film locations, photography, and as a leasing agent. She has never possessed more than a standard driver's license. Avallon is skilled at computer research and has some knowledge of basic computer programs. She can lift as much as 50 pounds.[15]

Avallon's hourly compensation over the past 20 years has fluctuated significantly. She earned approximately $20 per hour, plus overtime, from 1997 to 2003 while transporting 15-passenger van transporting crew members from their hotels to production locations. A full day could last as much as 17 hours long, with overtime being paid after 65 hours per week. Although sporadic, that work entitled Avallon to health benefits, pension fund contributions, and a $50 daily meal allowance. The duration of work assignments ranged from 10 to 24 days. The most Avallon worked in a given year was 8 months. During nonwork periods between end of summer 2003 and March 2004, she collected unemployment and performed part-time work picture taking at BJs, computer ordering products (included word and data processing), and scanning documents for an insurance agency.[16]

From March 2004 to 2006, Avallon earned $11 per hour, amounting to $25,000 annually, plus health benefits and a retirement plan, while working as a driver/mail clerk for Brown University.[17] In that capacity, she routinely carried and delivered mail to various campus offices, but found it increasingly difficult to lift heavy bulk mail. On one occasion, Avallon's supervisor reassigned her to clerical, nonlifting work in the office. As a result, Brown put her to work inside for 2 weeks until the pain went away. In August 2006, Avallon left to work in real estate.[18]

From 2006 to 2008, Avallon worked 32 hours per week for Tri Town Realty in North Attleboro as a leasing agent. In that capacity, she completed typewritten form leases and showed available apartment rentals. That job also paid $11 per hour, but did not provide health or retirement benefits.[19] While working at Tri Town, Avallon periodically submitted applications for office work-related positions at Brown University.[20]

On February 6, 2008, while still working at Tri Town Realty, Avallon spoke with Mark Harrington, Local 25's secretary-treasurer about her desire to return to work as a driver on motion picture jobs and to have her name placed on the regular employee list or the "Casual List." Avallon's request was denied and she grieved that decision on March 6, 2008, stating that "[y]ou have refused me work by not putting my name on the regular employee list or the "Casual List."[21] In response, Local 25 added her to the "Casual List" as number 145 on March 11, 2008. In that position, Avallon was eligible for work once the seniority list and the 144 members in front of her on

[13] While it is undisputed that Board law requires statutory interest to be assessed on any retroactive pension contributions, the Board also requires consideration of relevant documents in determining whether to assess other costs as well. The evidence includes a provision enabling Local 25, on behalf of the pension fund Trustees, to recoup any attorneys' fees, interest, liquidated damages, or penalties from the production company. There is no evidence in the record, however, contemplating a similar remedy against Local 25. (GC Exh. 6.)

[14] GC Exh. 1(i) at 4–6; GC Exh. 4.

[15] Avallon testified that she had difficulty performing heavy lifting, but conceded that she can lift up to 50 pounds. (Tr. 28–30, 116–119, 149–150, 155, 158, 194.)

[16] Avallon's testimony regarding her general employment history prior to the backpay period was generally credible and unrefuted. (Tr. 31–34, 139–145.)

[17] Local 25 stipulated that work paying $11 per hour is substantially equivalent to Local 25 work. (Tr. 34, 159.)

[18] I was not convinced by Avallon's statement that she was forced to leave the Brown job because of the heavy lifting component of the work. She conceded that she was accommodated at one point by being assigned to clerical work when she experienced back pain and never sought medical or other therapeutic support. Avallon also conceded that she can lift up to 50 pounds. As such, I find it likely that she left to take a more sedentary type of job as a real estate agent. (Tr. 34–36, 121, 146–148, 184–185.)

[19] Avallon's testimony about her employment at Tri Town was vague and inconsistent as to the period she worked there. (Tr. 36, 159–162.)

[20] Local 25 asserts that these 10 job applications are relevant to show a pattern as to why Avallon was unable to get work during the backpay period and remains unemployed today. It also contends that she was unqualified for these positions, but the General Counsel contends that Avallon was familiar with word processing, including Adobe Acrobat, and knows how to generate Excel spreadsheets. (R. Exh. 2–11; Tr. 157–158.) In any event, these applications provide little insight as they were job searches performed during a period of time when Avallon was working prior to the commission of the unfair labor practice on March 8, 2008.

[21] R. Exh. 12.

the casual referral list were exhausted.[22] Avallon appealed that decision on March 19, 2008, requesting that she be "restored to my former position on the Movie Seniority Referral list along with the other non CDL holders of Local #25 who have been 'Grandfathered In" and are now working on productions in an around the Boston area."[23]

Sometime in early April 2008, while her appeal to be restored to the Regular Seniority List was pending, Avallon gave 2-weeks notice and resigned from Tri Town Realty.[24] She also obtained a drivers' certification from the Department of Transportation on March 4, 2008. At that point, she expected to be called for driving jobs from the Casual List and wanted to be available if and when that happened.[25] On April 24, 2008, Avallon's appeal was denied and she filed an unfair labor practice charge the following day.[26]

B. Avallon's Efforts to Find Interim Employment

Between March 2008 and August 2011, Avallon submitted 17 job applications, mostly online and to nearby universities.[27] She limited her job search to full-time jobs in northeastern Rhode Island and southeastern Massachusetts that paid at least $10 per hour and provided health and retirement benefits.[28]

Avallon's initial application was to Brown University in April 2008, for a mail service coordinator position.[29] In May 2008, she submitted three more applications[30] with Brown University for positions as a secretary/receptionist position, office assistant, and administrative assistant.[31] From June to November 2008, Avallon submitted six applications for the following openings: administrative assistant, financial assistant, office assistant, stockroom assistant, staff assistant, and mail clerk.[32] After submitting her November 5, 2008 application for the mail clerk position, however, Avallon was informed by Brown University personnel that the college was in the midst of a hiring freeze. The general hiring freeze lasted until about September 2010.[33]

Avallon did not apply for any positions anywhere between November 2008 and June 2009.[34] When she renewed her effort to find employment, she did so sparingly.[35] On June 24, 2009, while Brown University's general hiring freeze was still in effect, she applied for a parking officer position.[36] On September 9, 2009, she applied for a position as a special program coordinator.[37]

In 2010, Avallon applied to three positions.[38] On February 3, 2010, she reapplied to the parking officer position.[39] On August 25, 2010, Avallon applied for an administrative assistant position.[40] On June 30, 2010, she applied for a library assistant position at the Boyden Library in Foxborough, Massachusetts. The position entailed basic computer operation, answering

[22] GC Exh. 7.

[23] R. Exh. 13.

[24] Avallon's testimony was vague and inconsistent as to when she gave notice to Tri Town, but there is no doubt that it occurred after she was placed on the casual list. (Tr. 174–176.)

[25] Avallon's assertion that there were ongoing movie productions and she expected to be contacted for work is corroborated by Judge Rubin's findings that others listed before and after her on the casual list were referred for driving work in 2008 and 2009. (Tr. 41, 175–177, 181; GC Exh. 1(a) at 5–6.)

[26] R. Exh. 14–15.

[27] The credibility of Avallon's efforts to find employment during portions of the backpay period was undermined by her failure to comply with a subpoena to produce notes allegedly generated by her and job rejection letters allegedly received. (GC Exh. 8.) Under the circumstances, I give no weight to a typewritten list that she generated for the hearing, and allegedly relied on to refresh her recollection, as to what was allegedly reflected in the missing notes. (Tr. 43, 50–52, 190–191.)

[28] Avallon's testimony that she did daily computer searches for interim employment was not credible, given the lack of specificity and corroboration. For similar reasons, I also did not credit her assertion that she networked with family and friends or spoke with someone at the unemployment office, who was unhelpful, even though he offered her use of their computer databases. She also mistakenly referred to southern Rhode Island instead of its northeastern portion, which is where Brown University and Providence are located. (Tr. 56–60, 189, 203.)

[29] GC Exh. 9.

[30] I found Avallon's explanation credible that discrepancies on the latter applications as to why she left her previous position were attributable to a simple failure to update her information on the form. (GC Exh. 8, 10–12(a), 32; Tr. 204–205.)

[31] I do not credit the conflicting testimony of Rhonda Jellenik, Local 25's vocational expert, as to whether Avallon applied for office jobs for which she was unqualified. As previously noted, Avallon knew how to use several computer programs, including Microsoft Office and Excel. (Tr. 231, 269–270.)

[32] The first five of those job applications indicated that the applicant had "No Interest to Interview."

However, the cross-examination merely established that such an entry meant that Avallon was not contacted by Brown University. With respect to her application for the mail clerk position, that opening was cancelled due to a hiring freeze. (GC Exh. 32; Tr. 151–152.)

[33] Avallon conceded being informed of the hiring freeze when she applied in November 2008. (GC Exh. 33; Tr. 111–112, 186–188.)

[34] Given Jellenik's testimony that there were thousands of jobs available that fell within Avallon's qualifications and experience in Massachusetts, I did not credit Avallon's sweeping assertion that "there was nothing out there." (Tr. 189.) Avallon may have been justified in limiting her search to jobs within a 60-mile range. (Tr. 203.) However, I did not find credible her assertion that she focused solely on openings that had offered health, retirement, meal or vacation plans comparable to Local 25's (83–84). On cross-examination, she conceded that she never considered benefits offered at the places that she did apply to in 2010 and 2011. (Tr. 120, 199–207.)

[35] I credit Jellenik's testimony that Avallon's job search efforts were virtually nonexistent. In her opinion, Avallon needed to send out at least 5 to 10 resumes to different employers per week and attend job fairs and career center for interviews. For example, Avallon never applied to hospitals, who were major employers during the backpay period. (Tr. 234–236)

[36] GC Exh. 21–21(a); Tr. 66.

[37] The job opening, entailing the coordination of all aspects of the Year of India Program, involving lectures, art, conferences and outreach, was geared to applicants with event planning experience. (GC Exh. 22–22(a).)

[38] I did not credit Avallon's vague and uncorroborated testimony, supposedly refreshed by the dubious notes (GC Exh. 8), that she applied by email in 2010 for positions at Norfolk Power Equipment, Whole Foods, and Natural Distributors, an unspecified child care agency, an unspecified furniture company, and temporary employment agency . (Tr. 70–75.)

[39] GC Exh. GC Exh. 24–24(a).

[40] GC Exh. 25(a).

telephones, and other clerical tasks.[41]

In 2011, Avallon applied to only two positions.[42] On March 1, 2011, Avallon applied for a laundry/housekeeping supervisor position and coordinator of plants and therapeutic animals at Madonna Manor, a skilled nursing facility in North Attleboro.[43] She also applied in or around May 2011, to Wheaten College for a mailroom position.[44]

C. The Availability of Substantially Equivalent Jobs[45]

Based on Avallon's employment history as a van driver, delivery driver, and leasing agent, she had transferrable skills to customer service representative, retail clerk, receptionist, information clerk, food preparation worker, counter clerk, cafeteria attendant, hostess, rental clerk, sales representative, telemarketer, account collector, and courier. Although paying considerably less per hour than driving in the movie industry, the hourly wages are comparable when considering that work in these areas is general steady work and not intermittent.[46]

Avallon's residence in North Attleboro is located in Southeastern Massachusetts, near the border between Massachusetts and Rhode Island; her home is considerably closer to Providence, Rhode Island than Boston, which was about a 35-mile commute.[47] The following job vacancies existed during the backpay period in the Greater Boston and Southeastern Massachusetts areas in the transportation and warehousing:[48] 2008-2nd Quarter: 1,015; 2008-4th Quarter: 943; 2009-2nd Quarter: 738; 2009-4th Quarter: 884; 2010-2nd Quarter: 1,024.[49]

In addition, the following job openings existed during the backpay period in the Greater Boston and Southeastern Massachusetts areas in food service, sales and office/administrative support: 2008-2nd quarter: 15,509; 2008-4th quarter: 13,509; 2009-2nd quarter: 9,856; 2009-4th quarter: 16,928; 2010-2nd quarter: 17,445.[50]

Legal Analysis

Backpay

The prior determination that Local 25 committed an unfair labor practice is presumptive proof that Avallon is owed a certain amount of backpay. *Minette Mills, Inc.*, 316 NLRB 1009, 1010–1011 (1995); *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987), enfd. 876 F.2d 678 (8th Cir. 1989); *NLRB v. Mastro Plastics Corp.,* 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The General Counsel's burden was, therefore, limited to showing the gross backpay due Avallon. *J. H. Rutter Rex Mfg. Co. v. NLRB,* 473 F.2d 223, 230–231 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973). In that regard, the General Counsel need show only that the gross backpay amounts contained in the compliance specification were reasonable and not an arbitrary approximation. *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Mastell Trailer Corp.*, 273 NLRB 1190, 1190 (1984). Local 25 does not contest the reasonableness of the compliance specification and, therefore, its calculations will be relied upon as the amount of gross backpay that would have been earned by Avallon as a driver in the movie industry during the backpay period.

As the General Counsel established gross backpay, the burden shifted to Local 25 to establish facts warranting a reduction of the amount due for gross backpay. *Atlantic Limousine*, 328 NLRB 257, 258 (1999); *Florida Tile Co.*, 310 NLRB 609 (1993); *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986). This burden can only be met, however, by a showing that: (1) there were substantially equivalent jobs within the relevant geographic area; and (2) the discriminatee unreasonably failed to apply for these jobs. *St. George Warehouse,* 351 NLRB 961, 961 (2007), affd. and enfd. 645 F.3d 666 (3d Cir. 2011).

A. The Backpay Period

Local 25's initial contention in attempting to reduce gross backpay is to shorten the backpay period. The compliance specification alleges that the backpay period commenced on March 8, 2008 and ended on August 24, 2011, at the end of the 6-month grace period provided in the updated 2011 Referral Rules. Local 25 does not dispute the commencement date, but contends that the backpay period ended March 24, 2011, since Avallon failed to obtain a CDL license during the 6-month grace period under the 2011 Referral Rules.

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[41] GC Exh. 26–27; Tr. 68–69.

[42] Again, I did not credit Avallon's vague and uncorroborated testimony that she applied by email for certain openings. As such, I do not find that she applied in 2011 to a veterinary practice, Wheaten College, and Sports Cars Unlimited. (Tr. 78–80.)

[43] I did not credit Avallon's testimony that she might have previously applied to Madonna Manor in 2010. (GC Exh. 29-30; Tr. 67, 75–77.)

[44] GC Exh. 31.

[45] Jellenik's sweeping assertion that Avellon should have obtained interim employment within 3 months was vague and unsubstantiated. (Tr. 238–240.) Accordingly, I gave it no weight.

[46] Local 25 provided expert testimony by Jellenik regarding the availability of substantially equivalent jobs and Avallon's qualifications to perform them. Her report, as well as the job surveys that she relied upon, were previously provided to the General Counsel, who had no objection to its receipt in evidence. Accordingly, I credit her testimony regarding applicable state and Federal employment statistics. (R. Exh. 17; Tr. 208–209, 214–219.)

[47] Jellenik did not provide statistics relating to available employment in Rhode Island, but conceded that its unemployment rate was consistently higher than Massachusetts' rate during the backpay period. (256–258)

[48] I relied on Jellenik's statistics of job vacancies in these areas, which were within reasonable commuting distance of Avallon's home, but not those in Northeastern Massachusetts. (R. Exh. 17 at 2.). I also did not rely on statewide estimates of 10,000 to 15,000 available transportation jobs 20,000 office jobs since they would have included jobs that were not within reasonable commuting distance to Avellon's residence. (Tr. 220–225, 229–330; R. Exh. 17 at 16–17.)

[49] The Massachusetts Workforce Development surveys for transportation jobs were issued twice a year in 2008 and 2009, once in 2010 and not issued in 2011. (R. Exh. 17 at 2; Tr. 221.) In the absence of evidence from the General Counsel indicating that those statistics were inaccurate or unreliable, I credit them as illustrative of transportation employment opportunities during 2008, 2009 and 2010.

[50] I excluded job openings listed for the Northeastern Massachusetts category. (R. Exh. 17 at 13–15.) Moreover, with respect to the listings of openings at 45 companies at unspecified locations between March 2008 and February 2011, I considered only the hourly wage rates to the extent that they demonstrated the substantially equivalent nature of such work. (Id. at 15–16.)

It is well established that where there are uncertainties or ambiguities, doubts should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corporation*, 204 NLRB 1068, 1068 (1973). In *United Aircraft Corporation*, the Board held that the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. Id. Further, in *Stagehands Referral Service* where the Respondent disputed the close of the backpay period chosen by the General Counsel, the Board emphasized the remedial purpose of the Act and adopted the General Counsel's end date for the backpay period. *Stagehands Referral Service* 354 NLRB 83, 89 (2009) (refusing to shorten the backpay period pursuant to a subsequent union referral for only 2 days because it would not further the remedial purposes of the Act).

A plain interpretation of the 2011 Referral Rules provides that Avallon's eligibility for work referrals ended on August 24, not March 24, 2011, Indeed, Local 25 waited until almost 6 months after the 2011 Referral Rules went into effect before reminding applicable members that the 6-month grace period was approaching and warning that they risked revocation of eligibility if they failed to obtain a CDL license. Local 25's contention that Avallon should not be afforded the benefit of a grace period because she failed to obtain a CDL license is unfounded. Avallon continued to have the right to be referred work from Local 25's hiring hall during that period of time regardless of whether or not she obtained a CDL license.

Moreover, since it is unclear as to whether Avallon undertook a good faith effort to obtain a CDL license during the grace period, any doubt or uncertainty in the evidence must be resolved in her favor. *NLRB v. NHE/Freeway. Inc.,* 545 F.2d 592, 594 (7th Cir. 1976) (resolving doubt in favor of the discriminatees where there was uncontradicted and corroborated evidence that discriminatees sought work at numerous institutions during the backpay period, but some of those institutions had no record of the applications being filed); *NLRB v. Miami Coca-Cola Bottling Co.,* 360 F.2d 569, 572–573 (5th Cir. 1966) (resolving uncertainty against employer whose unlawful discrimination made it impossible to determine whether the discharged employee would have earned a monetary safety award, which was included in the backpay). Accordingly, the backpay period is determined to have commenced on March 8, 2008 and ended on August 24, 2011.

B. The Availability of Substantially Equivalent Jobs

Local 25's initial burden is to prove the availability of substantially equivalent jobs available within the relevant geographic area for someone with the discriminatee's qualifications. *St. George Warehouse,* supra at 963.

Local 25 met its burden by proving that vacancies existed for substantially equivalent jobs existed in 2008, 2009 and 2010 in the Greater Boston and Southeastern Massachusetts areas.[51] Southeastern Massachusetts was in the immediate proximity of Avallon's residence, while the Greater Boston area involved commuting distances of approximately 40 miles. Local 25 did not, however, produce reliable evidence that such opportunities existed in 2011. Its vocational expert opined that suitable job vacancies existed in the Greater Boston and Southeastern Massachusetts areas at all times between 2008 and 2011, but provided only statistics from 2008 through 2010. Therefore, Local 25 failed to carry its burden of proof that there were substantially equivalent jobs within the appropriate geographic areas in 2011. See *Acosta v. Acosta*, 725 F.3d 868 (8th Cir. 2013) (unsupported expert opinion must be excluded), citing FRE 702(d) (requiring that expert opinion be based on sufficient facts or data); *Burgard v. Super Valu Holdings, Inc.,* 113 F.3d 1245 (10th Cir. 1997) (rejecting vocational expert's opinion as conclusory and unsupported by any evidence of the number and types of suitable and equivalent jobs in the appropriate geographic area).

C. Avallon's Efforts to Find Interim Employment

Local 25 also contends that Avallon unreasonably resigned from her job at Tri Town in April 2008 and then failed to undertake a good-faith search for interim work. The General Counsel contends that Avallon registered at Local 25's hiring hall and reasonably expected to be called back to work in the movie industry. Given the sporadic nature of such work, she then undertook a search for suitable work by applying to job openings in southeastern Massachusetts.[52]

It is undisputed that Avallon voluntarily resigned from Tri Town in April 2008, in order to make herself available for a return to anticipated work as a driver for the movie industry. Under the circumstances, the burden shifted back to the General Counsel to show that Avallon's decision to resign from Tri Town was reasonable and does not warrant an offset to gross backpay. *First Transit, Inc.*, 350 NLRB 825, 826–827 (2007) (discriminatee's resignation from interim employment was unreasonable when he resigned solely due to a pay cut); *Grosvenor Resort*, 350 NLRB 1197, 1201 (2007) (discriminatee's resignation from interim job after coworker embarrassed her in front of customers was unreasonable). As previously noted, that burden was satisfied by Judge Rubin's decision that there were ongoing movie productions at the time and other Local 25 members listed before and after her on the Casual List were referred for driving work in 2008 and 2009.

Local 25's also advances several arguments as to why an offset to backpay is warranted for the remainder of the backpay period. First, Local 25 argues that Avallon failed to undertake a reasonably diligent search for interim employment after leaving Tri Town because she was being supported by her husband and did not need to work. Further, Local 25 asserts that it was not reasonable for Avallon to focus almost exclusively on positions with universities, submit so few applications over the backpay period.

A discriminatee is entitled to backpay if he or she makes a reasonably diligent effort to obtain substantially equivalent

[51] It is insignificant that Local 25's did not interview Avallon or consult any employer regarding her prospects for any job opening. *St. George's Warehouse*, 351 NLRB at 962.

[52] I reject Local 25's contention that Avallon's unsuccessful job applications in 2006 to 2008, while still employed, created a pattern that is probative of her being unqualified for positions that she applied to during the backpay period.

employment. *The Lorge Sch. & Linda Cooperman*, 355 NLRB 558, 560 (2010) (discriminatee applied to over 600 jobs during an 8-month job search); *Flannery Motors, Inc.*, 330 NLRB 994, 995 (2000) (discriminatees sought substantially equivalent mechanic positions and had no duty to search for more lucrative employment). Such a search need not consist of a specific method that the respondent thinks would have been more successful. *United States Can Co.,* 328 NLRB 334 (1999), enfd. 254 F.3d 626 (7th Cir. 2001); *Continental Insurance Co.,* 289 NLRB 579 (1982). A discriminatee need not seek employment "which involves conditions that are substantially more onerous than [her] previous position," such as traveling distances substantially further from one's home. *St. George Warehouse, Inc.*, 645 F.3d 666, 673 (3d Cir. 2011). However, while the Board's analysis of the effort to find interim work does not depend upon a purely mechanical examination of the number or kind of applications generated, a discriminatee's search for work must be more than sporadic. *Moran Printing, Inc.*, 330 NLRB 376 (1999).

Avallon submitted 17 job applications between March 2008 and August 2011, a period of about 3-1/2 years. She submitted the applications mostly online and to nearby universities. Avallon also limited her job search to full-time jobs in northeastern Rhode Island and southeastern Massachusetts that paid at least $10 per hour and provided health and retirement benefits. Her job efforts essentially break down into three periods of time.

From April 2008 to November 2008, Avallon conducted a reasonable search for employment by submitting 10 job applications. She was qualified for those openings based on her skills and qualifications in customer service, clerical work, driving commercial vehicles, photography, real estate leasing, and basic computer operation and research. See *In Re J.J. Cassone Bakery, Inc.*, 356 NLRB 951 (2011) (citing *Mastro Plastics,* 136 NLRB 1342, 1359 (1962)) (employees made reasonable efforts to find interim employment based on their skills, qualifications, ages and labor conditions in the area). Avallon reasonably limited the scope of her job search to northeastern Rhode Island and southeastern Massachusetts where her home is considerably closer to Providence, Rhode Island than Boston, which was about a 35 mile commute. She was not obligated to search for work in northeastern Massachusetts, which involved substantially more onerous travel than her previous position. *See, e.g.*, *NLRB v. St. George Warehouse, Inc.*, 645 F.3d at 673 (discriminatee was not obligated to look for jobs substantially further than his former employer was from his home); *NLRB v. Westin Hotel,* 758 F.2d 1126, 1130 (6th Cir. 1985) (employee acted reasonably in choosing not to apply for available positions 25 miles away from home, where her previous employer was located, because she did not have adequate transportation).

From November 2008 to June 2009, however, Avallon failed to submit any job applications. Her situation is similar to the one in *Glenns Trucking Co.*, 344 NLRB 377 (2005). There, the Board held that the discriminatee failed to exercise reasonable diligence in searching for interim employment where the discriminatee went nearly a year with no evidence of any job search efforts, and tolled his backpay accordingly.

From June 2009 to May 2011, Avallon's job search was sporadic and she submitted only 7 job applications. Board analysis of a job effort does not depend upon a purely mechanical examination of the number or kind of applications for work made by a discriminatee. *Mastro Plastics Corp.* supra at 1359. However, Avallon's inactivity during this period of time was similar to the one portrayed in *Moran Printing*, where the Board held that the discriminatee failed to exercise reasonable diligence in seeking interim employment by merely signing the hiring hall's out-of-work book and having his union representative sign his unemployment forms. *Moran Printing, Inc.* supra at 376–377.

Moreover, this situation is distinguishable from cases where discriminatees were found justified in relying on job referrals from a union hiring hall. See *Big Three Indus. Gas & Equip. Co.,* 263 NLRB 1189, 1198 (1982) (discriminatee relied on union hiring hall and obtained regular interim employment which required roughly the same degree of skill). In *Midwestern Personnel Services, Inc.*, 508 F.3d 418, 423–424 (7th Cir. 2007), the Seventh Circuit affirmed the Board's backpay award where the discriminatee secured six jobs through the hiring hall list, found work on his own and registered with the state unemployment agency. In this case, however, Avallon recognized as far back as March 2008, that she would not be able to rely on her referral work from Local 25 and would need to look for alternative work.

In conclusion, Avallon did not undertake a reasonable job search in 2009, 2010, and 2011; her job search in 2011, however, is irrelevant since Local 25 failed to meet its burden of demonstrating the availability of substantially equivalent employment during that period of time.

D. Net Backpay

Based on the foregoing, Avallon is entitled to backpay for the four quarters of 2008 based on her demonstrated efforts during that time to obtain interim employment. Moreover, due to Local 25's failure to demonstrate the existence of available interim employment at any time in 2011, Avallon is entitled to backpay for the first three quarters of 2011. Backpay is tolled for all of the claimed quarters in 2009 and 2010. Accordingly, Avallon is owed $24,485.97 in net backpay based on the following amounts payable per quarter:

Year	Quarter 1	Quarter 2	Quarter 3	Quarter 4
2008	$1,656.72	$10,062.39	$5,510.95	$6,307.47
2009	0	0	0	0
2010	0	0	0	0
2011	$350.42	$350.42	$247.60	0

PENSION FUND CONTRIBUTIONS

The compliance specification included the sum of $11,010.86 in payments owed to the pension fund on Avallon's behalf during the backpay period. Local 25 did not contest the accuracy of that gross calculation, which was based on the number of hours worked during the backpay period by comparable employees multiplied by the applicable contribution rates.[53] Moreover, it concedes that Avallon has an economic

[53] Local 25 produced evidence as to the additional monthly pension benefit to Avallon, but the compensable amount at issue is the contribu-

interest in the future of the pension fund and is entitled to have contributions made to the fund on her behalf, but only to the extent that she is found to have used reasonable diligence in her job search.

Based on the compensable sum of net backpay owed Avallon, Local 25 is obligated to make whole the pension fund by contributing the corresponding amount of pension contribution, $5,553.12.[54] That amount is based on the following contributions per compensable quarter:

Year	Quarter 1	Quarter 2	Quarter 3	Quarter 4
2008	$558.88	$2,199.16	$1,157.19	$1,382.94
2009	0	0	0	0
2010	0	0	0	0
2011	$93.73	$93.73	$67.49	0

INCOME TAX REIMBURSEMENT

Pursuant to its decision in *Latino Express, Inc.*, 359 NLRB 518 (2012), the Board requires that respondents reimburse discriminatees for the adverse income tax consequences incurred by a lump-sum backpay award covering more than 1 year and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

The compliance specification includes an additional sum for the specific adverse tax consequence and Local 25 does not dispute the reasonableness of that gross calculation. It does contend, however, that *Latino Express* is inapplicable if Avallon's backpay award does not exceed 1 year. As previously noted, Avallon is entitled to backpay for 2008 and 2011. Accordingly, Avallon will be compensated for the adverse tax consequences of the lump-sum award of $24,485.97. The amount payable is the extent to which the Federal and State tax for that award exceeds the aggregate amount of taxes had the backpay been received incrementally each year. In addition, Avallon shall be reimbursed for the incremental tax resulting from the payment of the excess taxes on her behalf. For purposes of making such tax calculations, Exhibit 4 to the amended compliance specification is revised as follows:

Year	Taxable Income (Backpay)	Filing Status	Federal Tax	State Tax
2008	$23,537.53	Married Filing Jointly/Widower	$2,728.13	$1,247.49
2011	948.44	Married Filing Jointly/Widower	94.84	50.27
		Taxes Paid	$2,822.97	$1,297.27
2008-2012	$24,485.97			

CONCLUSION

Based on the findings and analysis set forth above, and on the entire record, I issue the following recommended supplemental[55]

ORDER

Respondent, the International Brotherhood of Teamsters, Local 25, its officers, agents, successors and assigns, shall make whole discriminatee Denise Avallon by paying her $24,485.97 in net backpay and an additional sum for the excess income taxes resulting from such award, plus interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010), accrued to the date of payment, and minus tax withholding required by Federal and State law. In addition, Local 25 shall make whole the New England Teamsters & Trucking Industry Pension Fund by contributing $5,553.12 on Avallon's behalf.

Dated, Washington, D.C. February 20, 2014

tions owed to the pension fund simultaneous with the payment of backpay pursuant to the CBA.

[54] As previously noted, the record is devoid of evidence authorizing, on behalf of the pension fund, the imposition of liquidated damages, attorneys fees (not applicable here), and monetary penalties.

[55] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.